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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 234.

THE UNITED STATES OF AMERICA EX REL. CHICAGO GREAT WESTERN RAILROAD COMPANY AND THE KANSAS CITY SOUTHERN RAILWAY COMPANY, PETITIONERS,

VS.

INTERSTATE COMMERCE COMMISSION; THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY; CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY; KANSAS CITY TERMINAL RAILWAY COMPANY; UNION PACIFIC RAILROAD COMPANY; AND MISSOURI PACIFIC RAILROAD COMPANY, RESPONDENTS.

BRIEF OF RESPONDENTS, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY; UNION PACIFIC RAILROAD COMPANY; CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY; AND MISSOURI PACIFIC RAILROAD COMPANY.

STATEMENT.

The Chicago Great Western Railroad Company and The Kansas City Southern Railway Company, petitioners

herein, are two of twelve proprietary companies using the facilities of the Kansas City Terminal Railway Company. The proprietors incorporated the Terminal Company for the construction and operation of the facilities, contracting to share equally in payments of interest and taxes and to divide operating expenses in proportion to their respective uses. The petitioners, purporting to proceed under Section 3 (1), (3) and (4), Section 15a and under other somewhat vaguely defined provisions of the Interstate Commerce Act, complained to the Commission that their payments of interest and taxes on the numerical basis were unlawfully discriminatory and burdensome, and asked the Commission to prescribe more equitable terms. (R. 63.) The Commission entertained the complaint, heard testimony, but held in 1925 that no case had been made out for relief under the Act, 104 I. C. C. 203, 225. (R. 69, 97.) In 1933 petitioners, conceiving that this amounted to an improper refusal of jurisdiction, brought mandamus. The Supreme Court of the District of Columbia dismissed the petition, and the Court of Appeals affirmed, 71 F. (2d) 336. (R. 199.) This Court granted certiorari.

This brief will be largely devoted to the question whether the Commission has the authority claimed by petitioners, an authority disclaimed by the Commission itself, and based upon no specific congressional grant of power but upon general language in the statute, chiefly the passages prohibiting unjust discrimination in rates, fares and charges and in the interchange of traffic among connecting lines.

The respondents, on whose behalf this brief is filed, have consistently opposed the claim of petitioners, both in the proceedings before the Commission and in these proceedings. Their opposition is not due to the mere fact that in this particular case their burdens of cost would be increased if petitioners' claim were to prevail. The respondent Burlington would not be greatly affected one way or the other, and the Union Pacific would gain. The stand of these respondents is more deeply rooted in their opposition to the destruction of vested contract rights of a proprietary nature through the exercise of administrative discretion, whenever a contract is regarded as discriminatory or is supposed to be burdensome on interstate commerce, or whenever it is thought to have been improvidently entered into.

FAR-REACHING CONSEQUENCES OF PETITIONERS' CONTENTIONS.

The surface singleness and simplicity of the petitioners' plea disappear when its reality and ultimate significance are appreciated. They seem to be asking only that the Commission be required to take jurisdiction of the case for the purpose of substituting the user rule for the unit rule in the apportionment of interest and taxes. But the Commission will not be able to stop with an examination of a single term of the agreements but will be required to examine all of the numerous intertwining and mutually dependent clauses of a comprehensive series of agreements; in short, will be compelled

in practical if not in legal effect to rewrite the contract for the parties. Full justice and equity would so require. Moreover, before being able fully to comprehend the reason for a particular term, the Commission would have to ascertain its origin, would be compelled to look into the prior relationship of the parties, to the position they occupied, to the property and property rights which they mutually surrendered for the common enterprise. Discrimination might appear on the surface with respect to one term, only to disappear when all other terms were taken into consideration. We most emphatically deny that the facts are undisputed and deny that the payments which petitioners must make are inequitable and constitute prejudice and discrimination. (Plf's. Brief, p. 13, Par. d.)

If the Commission has the sweeping powers which it is asserted to have with respect to the joint terminals and union stations, the Commission will have, under the same principles and the same interpretation of the Act, like power with respect to joint trackage agreements of which there are many thousands in existence throughout the United States. Indeed, in such event it is difficult to imagine a single contract of a carrier with anybody for any purpose which may not be subjected to the unlimited and unfettered revisory power of the Commission. Carriers would no longer be assured of a right to freely contract with respect to their property, which is still their own though devoted to a public use. In short, carriers would be entirely deprived of the ability to make binding contracts.

RESPONDENTS ADOPT BRIEF OF KANSAS CITY TERMINAL COMPANY.

Notwithstanding the deep concern and vital interest of these respondents in the issue presented by this case, they do not deem it necessary to file in this court an elaborate brief, because the brief of the respondent, Kansas City Terminal, has fully covered the points involved. What these respondents would say, therefore, would be largely repetitive. We are, therefore, content to adopt as our own the brief of the Terminal and with confidence to rely upon the principles of law therein set forth and the arguments therein advanced.

LOS ANGELES UNION DEPOT CASE CONTROLLING.

Moreover, we have implicit confidence in the fact that if the Supreme Court in the *Los Angeles Union Depot Case,* 280 U. S. 52, could not find authority in the Interstate Commerce Act for the Commission to order a new station to be built, it will find even greater difficulty in locating and defining the language which authorizes the Commission to rearrange and readjust the terms under which a joint terminal has already been built. We, also, have confidence arising from the fact that this Court has uniformly declined to read into uncertain, indefinite and general language, in the Interstate Commerce Act, an intent upon the part of Congress to confer a new, revolutionary and specific power. *Los Angeles Union Depot Case, supra;*

Interstate Commerce Commission v. *Oregon-Washington R. and Navigation Co.*, 288 U. S. 14; *I. C. C.* v. *Cincinnati, etc., R. Co.*, 167 U. S. 479; *Davis* v. *Pringle*, 268 U. S. 315, 318. This Court has not conceived, to paraphrase the language of Mr. Justice Holmes in the case last cited, that Congress would have intended to smuggle in a provision to destroy solemn contracts of a proprietary nature by muffled words.

LACK OF COMMISSION POWER CLEARER HERE THAN IN LOS ANGELES CASE.

The Court will find itself confronted with a greater difficulty in finding statutory authority in the present case, not only for the reasons which determined it in the Los Angeles case, nor alone because of the greater difficulties incident to the virtual revision of the complex terms of a contract already executed, but also because it will have to take into consideration certain positive language which Congress has used in Paragraph 15 of Section 1 and in Paragraph 4 of Section 3. In those two sections Congress has affirmatively sanctioned whatever agreements railroads may themselves make with respect to their joint facilities, and it is only in case the parties have not agreed that the Commission is authorized to take definite, positive and compulsory direction. The Congress in these two sections has sanctioned private agreement in respect to the very subject matter now under consideration, and has done so without limitation or exception, or provision for Commission review.

We are thus able to point out to the Court a very striking contrast in one particular between this case and the Los Angeles case, a particular which makes this case one in which it is much more difficult to find statutory authority for the relief sought. In the Los Angeles case the Court had to consider only certain broad and vague terms found in the Act and to decide that the power to order a new depot was not comprehended by them. In the present case it will be found that Congress has directed its thought to the very subject of compensation for the use of joint facilities and has affirmatively acted with respect thereto, but it has definitely limited its action in no uncertain terms to two situations and has thereby negatived an intent to deal with any other situations than those which it has explicitly covered. Our point will be made clear by reference to Paragraph 15 of Section 1 and Paragraph 4 of Section 3.

Paragraph 15 of Section 1 grants to the Commission power and authority (c) "to require such joint or common use of terminals, including main line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest and upon *such terms as the carriers may agree upon,* or in the event of their disagreement, as the Commission may after its hearing find to be just and reasonable."

Thus in an emergency Congress has conferred upon the Commission power to compel the joint use of terminals and to prescribe the terms and conditions of such joint use, but only in the event that the carriers have not agreed among themselves.

And likewise in Paragraph 4 of Section 3, Congress has conferred upon the Commission power and authority to require permanent use of terminal facilities and in this respect has enacted that the Commission "shall have power to require the use of any such terminal facilities, including main line track or tracks for a reasonable distance outside of such terminal, of any carrier, by another carrier or other carriers, *on such terms and for such compensation as the carriers affected may agree upon,* or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings."

Here again Congress has in unmistakable terms limited its grant of power to two situations and contingencies (1) to the situation of an outside carrier not then in the use and exercise of the facilities and (2) to fix the terms of compensation only in case the parties are unable to agree. It is further to be noticed that in granting this power and authority to the Commission it took into account the Fifth Amendment to the Constitution and provided that in the event the parties did not agree, the Commission should fix the reasonable terms and conditions upon the principles applicable to a condemnation case.

THE SO-CALLED "REVOLUTIONARY" GRANTS OF POWER.

The language of a general nature, prohibiting unjust discrimination and undue prejudice which counsel for

petitioners point specifically to and found in Paragraphs 1 and 3 of Section 3, has been in the statute since 1887. For the Court now to construe this language as petitioners desire, would be for the Court to ascribe to the Congress an intent, back in 1887, to plunge the carriers at once into an extreme form of regulation, to an extent not even ventured in the so-called "revolutionary" changes introduced by the Transportation Act of 1920.

Much has been said in the brief of petitioners of the general powers of the Commission with respect to the regulation of carriers, and they have stressed with particular emphasis the "revolutionary" changes made by the Transportation Act of 1920. It is significant that the most revolutionary changes effected by that Act related to (a) extensions and abandonments of lines (Paragraph 18 of Section 1) (b) to the acquisition of new lines and to consolidation (Section 5) and (c) to issuance of securities (Section 20a). In all of these cases this Court has recognized that the power conferred on the Commission is only a power to permit or authorize and not a mandatory power; and when, as in other instances, mandatory power has been conferred by the Transportation Act, such as in Paragraph (4) of Section 3 relating to joint facilities, and the division of earnings (Section 15), the power has been conferred in no uncertain terms. It will also be noted that in these instances the Congress has provided elaborate and detailed machinery for carrying out its will.

PETITIONERS' CONSTRUCTION OF ACT WOULD RENDER IT UNCONSTITUTIONAL.

If the provisions of the Act relied upon by petitioners were to be construed as empowering the Commission to strike down joint facility contracts, they would be unconstitutional. At the very least such a construction would raise grave doubts of constitutionality, and for that reason should be avoided to save the validity of the statute, as it plainly may be avoided in view of the undoubted fact that the language is fairly open to the interpretation that it does not give the claimed power.

If a railroad desired a terminal property of another, it could not seriously be contended that Congress could confer on the Commission power to order the taking of title, possession, or use without providing for due process and compensation. If a railroad buys and pays for a terminal property, and then finds it has made an improvident bargain, could Congress empower the Commission to order rescission and restitution? If a railroad owning a terminal property mortgages it for money for improvements, and then finds that the outlay has been injudicious, could Congress or Commission cancel the bonds because forsooth they might be regarded as a burden on an interstate carrier?

The facts with respect to the Kansas City Terminal are more complex than in the illustrations given, but the same elements are present and the same principles apply.

It is only when all of the complications are understood and all of the elements are appreciated that the

real merits of the situation may fairly be judged. It is an utterly misleading over-simplification of the problem to regard it as presenting merely the question of what is a fair rental charge for the use by one or two railroads of the property of another. Each of the twelve companies is a joint proprietor, as well as a joint user, of the facilities. The Terminal Company is but a corporate instrumentality of the proprietors. (R. 85-87.) What gave it life were the compromises, concessions, contributions of property, and mutual covenants of its founders. (R. 89-90.) Those covenants keep it alive today. They include not only the undertaking of the joint proprietors to share equally the expenses of interest and taxes, but also to pay an equal share of the principal of the bonds at their maturity in 1960, as well as the obligation to make renewals and repairs. (R. 85.) The current payments of taxes and interest are in consideration not alone of the current use of the Terminal but of the original concessions, compromises, contributions of property, and agreement to go into the enterprise, with all of its present sacrifices and future liabilities, on the part of some or all of the joint proprietors, and attach to and are inherent in the ownership of the property.

An example of the compromises and concessions is found in the location of the Union Station. Three sites were originally considered. Two of them were close to the line of the Burlington, and one or the other of them was greatly desired by it for reasons of economy and convenience. In the interest of the whole project, however, it finally agreed on the present location, although

this meant greater operating outlays and larger payments to the Terminal Company for a more extensive use of its trackage in reaching the Union Station. Other examples might be given if time and space were available.

Some of the roads made contributions of property of which the outstanding example will be given. This was the contribution by the Santa Fe, the Frisco, and the St. Paul of the property of the Kansas City Belt Railway Company. This property had been developed in the early eighties when real estate values were low, and its line embracing 63.8 miles of all tracks and serving over 150 industries, including the great packing houses and elevators, extended through the city from east to west. Its stock was owned by the Santa Fe with 2,200 shares, the Frisco with 1,100 shares, and the St. Paul with 550 shares. The St. Paul and the Santa Fe had trackage right agreements over the line, made in 1887 and 1888, respectively, to run in each instance for 99 years, while the Rock Island had a like right for a shorter term. The owners agreed by contract of 1906 to turn over this property to the new enterprise. On June 12, 1908, a contract was made between the Terminal Company and each one of the ten original proprietary companies by which the contract of May 21, 1906, was cancelled, and it was agreed that all of the stock of the Belt Company should be transferred to the new Terminal Company. The considerations named were the same as in the contract of 1906, namely, (1) the book value of the stock of $787,985, which was much less than its

real value, the uncontradicted evidence before the Commission showing a bare land value of over $7,000,000, not to mention the worth of franchises, structures, and equipment, as compared with the total cost of the property of about $3,500,000 to the new Terminal Company after taking into account both the cost of the stock and the bonded indebtedness assumed; (2) the building of the new union depot; (3) the execution of contracts by all of the parties for the use of the Union Station; (4) an agreement by the proprietary companies that they would each pay one-tenth of the fixed charges on the new terminal property, including taxes, and divide the operating and maintenance expenses on a wheelage basis; (5) an agreement by the Terminal Company to permit the use of the new facilities by all of the proprietary companies; (6) the provision of a complete double-track belt around the north and west sides of Kansas City for the use of all the proprietary companies; (7) the extension in perpetuity (later cut down to 250 years in the Operating Agreement) of the trackage rights of the Santa Fe, the St. Paul, and the Rock Island over the lines of the old Belt Company; and (8) a waiver by the Santa Fe, St. Paul, and Rock Island of their preferential operating rights over the Belt line. The petitioners became bound by this contract when later they joined in the enterprise.

The legal and equitable effect of these contributions is largely ignored by the petitioners. They have confined themselves rather weakly to the suggestion that the cash payment made for the stock of the Belt Com-

pany represented its full worth, and that the appraisal of its lands at over $7,000,000 is exorbitant. But if the cash payment were the only consideration of the contract, why were some seven additional considerations named by the parties when they drew the contract? If the appraisal of the land were at an exorbitant figure, why was no attempt made to contradict it? Do the petitioners really suppose that these lands, including a continuous right of way through the heart of Kansas City, were worth in 1908 no more than their book cost in the 1880's, and that they had not undergone a tremendous appreciation with the growth of the city in size, population, and wealth in the intervening period?

The former owners and users of the Belt line gave up a property of great value and strategic importance. The Santa Fe, the largest owner of the Belt property, made the largest use of it since it afforded this carrier its only line for through traffic across Kansas City. Today the fact that the old Belt line route is employed by the Santa Fe for its through passenger and freight business makes it the largest user of the terminal property; but the Santa Fe paid a partial *quid pro quo* for this use by its original contribution.

The Operating Agreement itself is much more than a contract between the Terminal Company and the tenant lines for the use of the property. In this instrument, entered into on June 12, 1909, between the ten proprietary lines of the Terminal Company and the Illinois Trust and Savings Bank, as trustee, the facts were set forth respecting the acquisition by the Terminal Com-

pany of certain properties, including those of the Kansas City Belt Railway Company. (R. 15.) It was agreed that each proprietary line *in consideration of the acquisition of the necessary lands, and the construction of the Union Station and other facilities,* and the grant by the Terminal Company of the use of all of such facilities by each of such lines, would pay in equal shares (1) interest on the bonds of the Terminal Company, (2) the principal of such bonds at maturity, and (3) taxes. (R. 16, 17, 20.) The length of the contract was fixed at two hundred years. (R. 17.)

On the same day, the Terminal Company and the ten proprietary lines entered into a stock trust agreement with the Pioneer Trust Company of Kansas City providing for the transfer of the shares of the capital stock in the Terminal Company owned by the proprietary lines to the trustee for the purpose of carrying out the provisions of the Operating Agreement, and as security for their performance. (R. 120.)

On June 7, 1909, the council of Kansas City, Missouri, granted a franchise to the Terminal Company for two hundred years conditioned upon the operation of passenger trains of the proprietary companies arriving in or departing from Kansas City into the Union Station. The Terminal Company and the proprietary companies, as a further condition, were required to agree to the construction of the Union Station on its present site, and to make necessary repairs and renewals from time to time. (R. 76, 81-85.)

The petitioners subsequently became parties to the Operating Agreement and stock trust agreement, and

they filed an acceptance of the terms of the city ordinance granting the franchise.

The Operating Agreement and supplemental operating agreements, as well as the stock trust agreement and supplemental stock trust agreement, are deposited with the trustee as security for $50,000,000 of bonds of the Terminal Company. (R. 39, 50, 121-122.)

This whole series of contracts, and the franchise granted by Kansas City, all requiring an equal division of interest and taxes, were entered into for what the parties at the time obviously regarded as satisfactory considerations. Petitioners say the Interstate Commerce Act requires the striking down of these solemn contracts as discriminatory, burdensome and improvident. They are unable, however, to point to any specific provision in the statute evincing a plainly expressed intention on the part of Congress to regulate, revise, or in any way impair the obligation of such contracts. They ask this Court to raise up the power by a remote inference from general language which has always been understood to be confined in its application to discrimination in charges for the transportation by railroads of persons and property of the general public. To so construe the statute, we submit, would plainly constitute a taking of the vested property rights of the respondents in the agreements affecting the proprietorship and use of this joint terminal facility. At the very least, such a construction should be viewed with disfavor to avoid the serious constitutional questions it would raise.

CONGRESS DID NOT INTEND TO UNDERTAKE COMPREHENSIVE REGULATION OF JOINT FACILITIES.

The joint terminal facilities owned and operated by the railroads in many cities throughout the country involve many complexities with respect to property interests, as well as contractual and franchise obligations. If they are to be regulated or readjusted by the federal government, it is quite evident that the very nature of the problem requires many special provisions and much detailed machinery. "A proper statute," this Court said with respect to an analogous situation in the *Los Angeles Union Depot Case, supra,* at page 69, "would seem to require detailed directions, and we should expect the intention to be manifested in plain terms and not to have been left to be implied from varied regulatory provisions of uncertain scope." Here, as there, the absence of plain terms, appropriate directions, and adequate machinery is eloquent witness of utter lack of any intention on the part of Congress to undertake far-reaching regulation.

PETITIONERS' CONTENTIONS WITH RESPECT TO EQUITIES.

The petitioners urge with great insistence that the unit basis of dividing the fixed charges of the Terminal in interest and taxes, by which each company using its facilities pays an equal part of such expenses, is grossly unfair and inequitable. They seek to substitute the user

basis, under which each participating carrier would pay interest and taxes in the proportion that its use bears to the total use actually made of the property by all of the lines. In their brief they cite examples of what they regard as proof of the glaring injustice of dividing interest and taxes on the unit or numerical basis. They say in 1932 the Chicago Great Western, making 2.61 per cent of the total use, was nevertheless required to pay 8-1/3 per cent of the interest and taxes, whereas the Santa Fe, making 26.05 per cent of the total use, was required to pay only the same 8-1/3 per cent of those items. By this means, it is said, the Chicago Great Western paid $130,779.39 for something it did not receive, whereas the Santa Fe received $404,351.76 worth of service for which it paid nothing.

This argument has a surface plausibility. The contention that each line should make current payments in accordance with the proportion of use which it enjoys has at first a logical ring.

DEFECTS IN PETITIONERS' CONTENTIONS.

But this facile argument is unsound. Its premises are fatally defective; they involve an assumption of simplicity of situation which fails to correspond to the reality.

The argument ignores the inequality of the concessions and contributions originally made by the proprietary lines.

It ignores the fact that the large users already pay a greater proportion of the total costs.

It ignores the justice of requiring proprietors of a joint facility to pay on the basis of capacity provided rather than fluctuating use made of the facilities, of which there is an unlimited right of user.

ORIGINAL CONTRIBUTIONS UNEQUAL.

The mere fact that the larger users make a greater use of the Terminal than the Great Western does not mean that they are getting something for nothing, when they pay no more than the Great Western on account of interest and taxes. There have been two classes of payments made to the Terminal for the service it furnishes; (1) the original contributions, and (2) the current payments. Both of these must be taken into account. It is grossly inaccurate to disregard either of them. The Santa Fe, to adopt the illustration selected by the petitioners, originally made a considerable capital contribution, whereas it is not so much as intimated that the petitioners made any at all. There is no showing that the total contributions by the larger users fail to be commensurate with the extent of their enjoyment of the facilities.

The petitioners are unfortunate for another reason in singling out the Santa Fe as a horrible example of getting something for nothing. They forget that the extensive use of the terminal by the Santa Fe is largely because it runs its trains through Kansas City over the old Belt line route, and that its right to do so flows not alone from the Operating Agreement, but from the trackage rights over the Belt line it reserved and which

by the Operating Agreement were extended for a period of two hundred and fifty years, when it parted with its other interests in the Belt property.

LARGER USERS NOW PAYING A GREATER PROPORTION OF TERMINAL COST.

The petitioners, in stressing the disparity between their proportion of actual present use of the facilities and the proportion of their outlay for interest and taxes, as compared with those of the larger users, overlook the fact that when all of the costs of the Terminal are considered, they pay much less than the larger users. For instance, the Chicago Great Western in 1932 bore 5.77 per cent of all costs, and the Kansas City Southern, 5.61 per cent, whereas the Santa Fe bore 16.27 per cent, the Rock Island, 12.42 per cent, and the Missouri Pacific 12.11 per cent. The reason for this is that operating expenses are divided in accordance with the proportion of current use, and include heavy charges for maintenance which, although attributable to unused as well as used capacity, are embraced in operating expenses, thus falling disproportionately on the larger users.

CAPITAL IMPROVEMENTS MUST BE PLANNED AND ORDERED FAR IN ADVANCE.

Fixed improvements like the monumental union passenger station and other terminal facilities at Kansas City cannot be ordered like current supplies—coal and oil and such articles, and purchased from time to time

in quantities in keeping with the requirements of the moment. They must be ordered long in advance. The needs of the future must be forecast as accurately as may be. The possibilities of error, of misreading the future and miscalculating its requirements, are great indeed. Prophecy is difficult, and the business man who must resort to it always risks serious loss.

OWNERS OF CAPITAL IMPROVEMENTS MUST PAY FOR CAPACITY RATHER THAN USE.

Important business structures, unlike expendable goods or short-lived equipment, must be planned for long in advance, take years to build, and are ordinarily designed to accommodate the needs of the business over extended periods of time, thirty, forty, fifty, a hundred or two hundred years. When built by a single company for its own exclusive occupancy, it may prove always exactly suitable for the size of the business carried on. Oftener than not, however, it turns out to be too large or too small. If too large, the actual use is less than the full capacity, and the capital charges are disproportionately large in comparison with the actual needs of the business, this being a burden imposed on the owner by reason of the inaccuracy of his forecast when building plans were being made. The result is unfortunate but, so far as there is any blame at all, its rests on the one who was unable to see clearly into the future.

The situation is no different than in the first example if two firms engaged in the same line of business enter into a cooperative arrangement for the construction of

a building or other capital facilities. The size and cost of the structure are determined by the combined estimate of the future needs. If this be correct in all particulars, there should be no difficulties about the burden of capital charges. If both overestimated their requirements in equal degree and the capacity provided turns out to be larger than necessary, both must bear a capital burden which, when measured by their actual needs and actual use of capacity, is excessive, but neither is entitled to relief and neither can secure any save through bankruptcy. If, on the other hand, one of the participants accurately estimates his needs and utilizes to the full his share of the capacity of the improvements, while the other optimistically overestimates his requirements and actually uses only a fraction of his share of this capacity, is there any reason why there should be a readjustment of the capital charges? In such circumstances, would it be equitable or just or lawful to readjust the capital burden on the basis of user and require the first party to pay for a capacity which he did not order and does not need so as to relieve the second party of the necessity for paying for a capacity which he did order, and for whose provision he is entirely responsible, although he finds himself unable to use. Here clearly the second party under every principle of law and justice is required to abide the results of his own mistake in providing for a capacity in the jointly used property in excess of his needs. If he has become a joint owner of a building and is entitled to use 50 per cent of the capacity but only uses 10 per cent, whereas the other joint owner uses his entire 50 per cent, he is entitled neither to be relieved

of all of the capital burden in excess of the proportion of his use to the total capacity, that is, of everything in excess of 10 per cent, nor to be relieved of his proportion of the capital burden in excess of his proportion of the total use, that is, of everything in excess of 16-2/3 per cent, which is his proportion of the total use when the plant is used only to 60 per cent of its capacity.

PARTICIPANTS IN KANSAS CITY TERMINAL UNDERTOOK OBLIGATIONS OF OWNERS.

The situation with respect to the Kansas City Terminal, although more complex than in the illustration just given, is essentially the same in principle. This property was eight years in building, including the time spent in negotiating for real estate and franchises, and those promoting it hoped for a useful life of from fifty to two hundred years, the latter of which was made the term of the Operating Agreement. The twelve participating lines were making an outlay for capital improvements to last for that period of time and were of necessity ordering their terminal requirements that far in advance. This was a long commitment—but certainly no longer than called for by the exigencies of the situation. They were compelled to provide for their requirements in that way. Nobody was willing to construct the terminal plant and grant short-term leases or operating agreements to the various carriers entering into the city. Nobody was able and willing to run the risk at the end of limited periods, of say ten or twenty

years, of losing tenants or being forced to accept reduced compensation. An independent terminal company, one independently financed, owned and operated for profit was an impossibility. The participating lines of necessity were forced to assume the responsibility. They built the terminal, employing the convenient instrumentality of the Terminal Company, which, although independent in theory, was and is in fact dependent for its very existence and its ability to proceed upon the financial guaranties and the covenants of use by the participating lines. Each of the companies by its original commitments ordered a fairly definite part of the total capacity of the Terminal Company in furnishing facilities of the required kind. Each of the roads was under the necessity at that time of making an accurate forecast of its terminal requirements in Kansas City over a period of from fifty to two hundred years, the estimated service life of the elaborate and expensive plant provided. In every essential and substantial respect this was a capital commitment which only the bankruptcy of a contracting party could relieve against. If any one of them overestimated its probable future need, that was its own fault, so far as there is any fault attributable to finite human minds in being unable to pierce so far into the future.

LARGER USERS NOT UTILIZING UNDUE PROPORTION OF CAPACITY.

One of the fundamental errors of the petitioners is that they overlook entirely the most important question of the capacity of the Terminal and have regard only to the

extent of actual use. They do not so much as consider whether the actual use made by the so-called larger users, the Santa Fe, the Rock Island and the Missouri Pacific, is in excess of the capacity ordered by them at the inception of the enterprise. They ignore the fact that in the case of the Santa Fe, for instance, its alleged present enjoyment of 26.05 of the total use, which is not conceded, might even if true involve no more than the proportion of the total capacity which the Santa Fe originally ordered and to which it committed itself. As long as the Santa Fe or the other large users do not each use more of the total capacity than the proportion for which it originally committed itself, there cannot be the slightest inequity in limiting its capital burden to that proportion of the whole.

PETITIONERS ARE ALONE RESPONSIBLE IF THEY OVERESTIMATED EXTENT OF THEIR NEED OF TERMINAL FACILITIES.

At least half of the cost of the Terminal represents an outlay on account of passenger business in providing the monumental union passenger station with its appurtenances and the expensive avenues of approach for the various rail lines. When the project was set on foot, the passenger business was and had been for years increasing in volume at a rapid rate and to all appearances there were many good reasons why even the smaller lines should be optimistic with respect to their future requirements. The subsequent history of the passenger business is a matter of common knowledge. It has long ceased to in-

crease. For years it has been subject to a progressive decline. This loss of business has been greater for short runs, such as those of some of the smaller users as compared with the longer runs, such as those of some of the larger users. It may be that the petitioners and some of the other smaller users failed when they entered into the project in 1908 or 1910 to make an accurate forecast of these developments, or that they committed themselves to capital improvements in excess of their present needs. But the burden of these mistakes cannot be justly forced upon the shoulders of the larger users. Regardless of any question of legal rights, it is monstrously unfair and inequitable even to suggest such a transfer of burdens without showing that the larger users are in fact employing a proportion of the total potential capacity in excess of their proportion of the original contributions and undertakings for continuing payments. When the extent of the present use is considered, it must be gauged in the light not of total present use but of total potential capacity because that is the thing that the participating carriers expended their money to create.

The Kansas City Terminal, however, cannot be regarded as solely a passenger terminal. With its 172 miles of all tracks serving some 208 industries, many of them of the greatest importance from the standpoint of revenue and tonnage, it is a tremendously valuable freight terminal. In 1923 its traffic, measured by car miles, was 73.4 per cent freight, its passenger business being only 26.6 per cent. To reproduce the freight facilities today would entail an outlay greatly in ex-

cess of the original cost. From every standpoint those facilities are worth more than they cost, and their enhancement in value has made up for any decline in the value of the passenger facilities, if indeed any decline has taken place.

Petitioners have at no time shown, or even attempted to show, that when all of their terminal costs are considered, both passenger and freight, they are paying more than the value of the service.

COMMISSION HAS DEFINITELY UPHELD FAIRNESS OF CAPACITY BASIS.

We wish to emphasize these equitable considerations in this Court because our predominating attention to the legal issues of the case in the proceedings before the lower courts seems to have led those tribunals into a mistaken assumption that the equities were really with the petitioners.

The Commission in its first decision (104 I. C. C. 203, 225) fell to a more limited extent into the same error, in suggesting the advisability of a reexamination by the respective participating carriers of the whole arrangement. But at the same time it recognized that anything of this sort would require an adjustment of property interests; and later, in the second *Missouri-Kansas-Texas Case,* 198 I. C. C. 4, 12, when it had occasion to make the reexamination itself and to come closer to grips with the real problem, it held that payments for interest and taxes should be on the unit or numerical rather than the user basis, even in the case

of a small user unencumbered and unembarrassed by binding contractual obligations. Its holding there that the proper basis of measurement of payments of joint users for capital improvements is assigned capacity rather than fluctuating use is a definite adjudication of the lack of merit of the petitioners' claim.

CONCLUSION.

For the reasons herein set forth as well as those advanced in the brief of the Kansas City Terminal, these respondents respectfully pray the Court that the judgment of the Court of Appeals be affirmed, and that the writ of mandamus prayed for be denied.

CHARLES H. WOODS,
JONATHAN C. GIBSON,
E. A. BOYD,
1211 Railway Exchange Bldg., Chicago, Ill.,
BRUCE SCOTT,
WALTER McFARLAND,
547 W. Jackson Blvd., Chicago, Ill.,
W. F. DICKINSON,
W. F. PETER,
La Salle Street Station, Chicago, Ill.,
J. M. SOUBY,
1416 Dodge Street, Omaha, Neb.,
FRANCIS W. CLEMENTS,
Washington Building, Washington, D. C.,
H. H. LARIMORE,
Missouri Pacific Bldg., St. Louis, Mo.,
Attorneys for Respondents.